Supreme Court of the United States.

No. 372.—October Term, 1903.

Henry O. Houghton, Trustee, et al., Appellants, vs. Henry C. Payne, Postmaster General. } On appeal from the Court of Appeals of the District of Columbia.

[April 11, 1904.]

This was a bill in equity originally filed in the Supreme Court of the District of Columbia by the firm of Houghton, Mifflin & Co., against the Postmaster General, praying that a certain publication, known as The Riverside Literature Series, be entered and transmitted through the mails as second class mail matter, and for an injunction to restrain the cancellation of a certain certificate of entry, previously issued, allowing such transmission.

The answer denied that the Riverside Literature Series constituted a periodical within the meaning and intent of the statute; that, although complying with the external characteristics and conditions of second class mail matter, nevertheless, internally and in substance, they have not the characteristics of second-class matter, but have the peculiarities of books, and are in fact books.

The case was heard upon the pleadings and an exhibit of the series, and a decree rendered in accordance with the prayer of the bill. (31 Wash. L. Rep. 178.) An appeal was taken to the Court of Appeals of the District of Columbia, which reversed the decree of the Supreme Court and dismissed the bill. (31 Wash. L. Rep. 390.)

Mr. Justice Brown delivered the opinion of the Court.

This case depends upon the construction of the following sections of the Post Office appropriation bill of March 3, 1879, (20 Stat. 355, 358):

"Sec. 7. Mailable matter shall be divided into four classes:
First. Written matter;
Second. Periodical publications;
Third. Miscellaneous printed matter;
Fourth. Merchandise."

Matter of the second class is thus described:

"Sec. 10. That mailable matter of the second class shall embrace all newspapers and all other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen.

"SEC. 11. Publications of the second class (except as provided in section 25) shall be entitled to transmission through the mails at two cents a pound or fraction thereof.

"SEC. 12. That the matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage such matter shall be charged with postage at the rate to which the enclosed matter is subject:

"*Provided*, That nothing herein contained shall be construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers:

"*Provided, however*, That nothing herein contained shall be so construed as to admit to the second class rate regular publications, designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

And by the act of March 3, 1885, (23 Stat. 385,) it was provided that second class matter (saving that excepted in section 25) shall, on and after June 1, 1885, be entitled to transmission through the mails at one cent a pound or fraction thereof.

Section 17 declared that mail matter of the third class shall embrace books, transient newspapers and periodicals, circulars, &c., and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof.

Are the publications of the Riverside Literature Series periodicals, and therefore, belonging to the second class of mail matter, and entitled to transmission at the rate of one cent a pound; or books, as designated in the third class, and subject to postage at the rate of one cent for each two ounces?

The publications are small books, 4½ by 7 inches, in paper covers, and are issued from the office of publication either monthly or quarterly, and numbered consecutively. Each number contains a single novel or story, or a collection of short stories or poems by the same author, and most, if not all of them, are reprints of standard works by Thackeray, Whittier, Lowell, Emerson, Irving, or other well known writers, and from a literary point of view are of a high class. Each number is complete in itself and entirely disconnected with every other number. Upon the front page of the cover appears, at the top, the words "Issued Monthly," followed by the num

ber of the serial and the date of issue. Below, the words "Riverside Literature Series" are prominently displayed, and in the center of the page appears the name of the book. Each number complies with the conditions of section 14, upon which the publication may be admitted to the second class, namely, it is regularly issued at stated intervals, at least quarterly, and bears a date of issue and is consecutively numbered. It is issued from a known office of publication; is formed of printed paper sheets, without board, cloth or leather, or other substantial binding, and is published for the dissemination of information of a public character; or devoted to literature, &c. The bill also avers that the series has a legitimate list of subscribers, but does not aver that they were reading subscribers in the ordinary sense of the term. This distinction, however, is not pressed by the Government. If the fact be that this series becomes a periodical by a compliance with the conditions of section 14, under which it is entitled to be transmitted as second class mail matter, we shall be compelled to say that the decree of the court below was wrong.

But while section 14 lays down certain conditions requisite to the admission of a publication as to mail matter of the second class, it does not define a periodical, or declare that upon compliance with these conditions the publication shall be deemed such. In other words, it defines certain requisites of a periodical, but does not declare that they shall be the only requisites. Under section 10 the publication must be a "periodical publication," which means, we think, that it shall not only have the feature of periodicity, but that it shall be a periodical in the ordinary meaning of the term. A periodical is defined by Webster as "a magazine or other publication which appears at stated or regular intervals," and by the Century Dictionary as "a publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics and no one of which is contemplated as forming a book of itself." By section 10 newspapers are included within the class of periodical publications, although they are not so regarded in common speech. By far the largest class of periodicals are magazines, which are defined by Webster as "pamphlets published periodically, containing miscellaneous papers or compositions." A few other nondescript publications, such as railway guides, appearing at stated intervals, have been treated as periodicals and entitled to the privileges of second class mail matter. (*Payne* v. *Railway Pub. Co.*, 20 D. C. App. 581.) Publications other than newspapers and periodicals are treated as miscellaneous printed matter falling within the third class.

While it may be difficult to draw an exact line of demarkation between periodicals and books, within which latter class the Riverside Literature Series falls, if not a periodical, it is usually, though not always, easy to determine within which category it falls, if the character of a particular publication be put in issue.

A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature or some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, &c., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects.

A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding, (although this is by no means essential,) but in the fact that it ordinarily contains a story, essay or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity is not an element of their character. The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation. It is sufficient to observe that, in our opinion, the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. Were it not for the fact that they are so issued in consecutive numbers, no one would imagine for a moment that these publications were periodicals and not books. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive, when all their other characteristics are those of books rather than those of magazines.

The fact that these publications are not bound when issued or intended for preservation, is immaterial, since in France and most of the Continental countries nearly all books, even of the most serious and permanent character, are usually issued in paper covers, thus leaving each purchaser to determine for himself whether they are worth a binding of more substantial character and preservation in his library. It is true that in this subdivision of section 14 it is said that a periodical must be without such substantial binding as to distinguish printed books for preservation from periodical publications, but it is by no means to be inferred from this that to constitute a book the publication must have a substantial binding.

Great stress is laid by counsel upon the original interpretation of the term "periodical," as applied to these books, which it is said was con-

tinued without change under different administrations and by several successive Postmasters General, and from 1879, the date of the passage of the act, until 1902, when the certificates granted by the former Postmasters General were revoked by the defendant and a different classification made of the publications now in issue, that the attention of Congress was repeatedly called to the evils and to the large expense incurred by the government by the admission of publications of this description to mail matter of the second classs; that Congress seriously considered these representations, and committees made voluminous reports thereon, yet Congress persistently refused to change by legislation the ruling of the Postmasters General in that regard.

We had occasion to consider this subject at length in the case of the *United States* v. *Alabama R. R. Co.*, (142 U. S. 615, 621,) in which we held that this court would look with disfavor upon a change whereby parties who have contracted with the government on the faith of a former construction might be injured; especially when it is attempted to make the change retroactive, and to require from a contractor a return of moneys paid to him under the former construction. This case is not open to the same objections. No contract with the government is set up whereby the latter agreed to carry these publications as second class mail matter. Much less is any repayment demanded of money paid by the government under the prior construction. The action of the government consists merely in the revocation of a certificate or license admitting these publications as mail matter of the second class. No vested right having been created by such certificate, no contract can be said to be impaired by its revocation. (*Salt Co.* v. *East Saginaw*, 13 Wall. 373; *Grand Lodge* v. *New Orleans*, 166 U. S. 143, 147.) It was said, in that case, that the construction is one which, though inconsistent with the literalism of the act, certainly consorted with the equities of the case. Whereas in the case under consideration, if we are to believe the statements of counsel, which are not denied, the carriage of these publications as second class mail matter entails annually an enormous loss upon the government and constitutes an odious discrimination between publishers of books and publishers of the so-called periodicals.

But in addition to these considerations it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. (*United States* v. *Graham*, 110 U. S. 219; *United States* v. *Finnell*, 185 U. S. 235.) A custom of the department, however, long continued by successive officers, must yield to the positive language of the statute. As was said in the Graham case (p. 221), "if there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controll-

Contemporaneous construction is a rule of interpretation, but is not an absolute one. It does not preclude an inquiry by the Court as to the original correctness of such construction

ing, in its effect. But with the language clear and precise and with its meaning evident there is no room for construction and consequently no need of anything to give it aid. The cases to this effect are numerous. (*Edwards' Lessee* v. *Darby*, 12 Wheat. 206; *United States* v. *Temple*, 105 U. S. 97; *Swift Co.* v. *United States*, 105 U. S. 691; *Riggles* v. *Illinois*, 108 U. S. 526.)" While it might well happen that by reason of the relative unimportance of the question when originally raised a too liberal construction might have been given to the word periodical, we cannot think that if this question had been raised for the first time after second class mail matter had obtained its present proportions, a like construction would have been given. Some consideration in connection with the revocation of these certificates may properly be accorded to the great expense occasioned by this interpretation, and the discrimination in favor of certain publishers and against others, to which allusion has already been made. We regard publications of the Riverside Literature Series as too clearly within the denomination of books to justify us in approving a classification of them as periodicals, notwithstanding the length of time such classification obtained, and we are therefore of opinion that the judgment of the Court of Appeals was correct, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 481.—October Term, 1903.

Ormond G. Smith et al., Appellants, vs. Henry C. Payne, Postmaster General. } Appeal from the Court of Appeals of the District of Columbia.

[April 11, 1904.]

This was also a bill, filed by the firm of Street & Smith, to enjoin the Postmaster General from cancelling certain certificates of entry admitting the publications of complainant firm to the mail as second class mail matter. This case took the same course as the preceding one.

Mr. Justice Brown delivered the opinion of the Court.

Plaintiffs are the publishers of several different series of novels under the names of The Columbia Library, The Bertha Clay Library, The Magnet Detective Library, The Medal Library, The Undine Library, The Eden Series, The Arrow Library, and some others. The books of these series are apparently of an inferior class of literature, and are numbered consecutively; but the only thing to indicate that they are issued periodically is a notice upon the outside of the back cover in small type that they are weekly or semi-monthly publications.

The considerations moving us to affirm the decree of the Court of Appeals in the case of *Houghton* v. *Payne*, just decided, apply with much greater persuasiveness to this case, and the decree dismissing the bill is, therefore,

Affirmed.

Mr. Justice Harlan and the Chief Justice dissent in this case for the reasons stated in their dissenting opinions in *Houghton* v. *Payne* and *Bates & Guild Co.* v. *Payne*.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 372.—October Term, 1903.

Henry O. Houghton, Trustee, &c., Appellant, vs. Henry C. Payne, Postmaster General. } Appeal from the Court of Appeals of the District of Columbia.

[April 11th 1904.]

Mr. Justice Harlan (with whom concurred the Chief Justice) dissenting.

The Chief Justice and myself are unable to concur in the opinion of the court.

It was admitted at the bar that for more than sixteen years prior to May 5th 1902 the Post Office Department had acted upon the identical construction of the statute for which the appellants contend. During that period many different Postmasters General asked Congress to amend the statute so as to exclude from the mails, as second class matter, such publications as those issued by the appellant, and which, under the present ruling of the Department, are declared not to belong to that class of mailable matter. Again and again Congress refused to so amend the statute, although earnestly urged by the Department to do so.

Representative Cannon, now Speaker of the House of Representatives, in a speech in opposition to the proposed change of the statute, explained the reasons that induced Congress to pass the act of March 3d 1879, *c.* 180, *R. S. Supp.* 454. He said: "Before speaking on the merits of this bill, I wish to say to the gentleman from Georgia that, according to my recollection, by legislation advisedly had, prior to 1879, while I was a member of the Committee on the Post Office and Post Roads, this class of literature was allowed to pass through the mails, the policy of that legislation being to encourage the dissemination of sound and desirable reading matter among the masses of the people of the country at cheap rates, both as to the cost of the books themselves and as to the postage. The question was discussed, unless my memory greatly misleads me, and the legislation was advisedly had. Under this legislation the best classes of literature, for instance, the Waverley Novels, Dickens's works, and the new translation of the Bible, have been sent by publishing houses unbound, stitched, so that they could be sold to the people at ten cents a volume. As a consequence of this you may now find in the homes of our farmers and laboring men throughout the length and breadth of the country in this cheap form, issued at ten cents per volume, a class of literature to which, prior to the

adoption of this policy, some people in very good circumstances could scarcely have access." *Cong. Rec., vol.* 19, *p.* 911.

The result is that after the Department had for sixteen years construed the statute to mean what the appellants say it plainly means, and after Congress had uniformly refused, upon full investigation, to comply with the requests of Postmasters General to so amend the statute that it could be interpreted as the Government now insists it should always have been interpreted, the Post Office Department ruled, on May 5th 1902, that the appellants' publications, known as the "Riverside Literature Series," could not go through the mails as second class matter. This ruling was made notwithstanding a Post Office official, having power to act in the premises, had issued to the appellants a certificate declaring that the "Riverside Literature Series" had been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails as second class matter.

Thus, by a mere order of the Department that has been accomplished which different Postmasters General had held could not be accomplished otherwise than by a change in the language of the statute itself, which change, as we have said, Congress deliberately refused to make after hearing all parties concerned and after extended debate in each House.

It has long been the established doctrine of this court that the practice of an Executive Department through a series of years should not be overthrown, unless such practice was obviously and clearly forbidden by the language of the statute under which it proceeded. In *United States* v. *Finnell*, 185 *U. S.* 236, 244, which case related to certain fees claimed by a clerk of a court of the United States, this court said: "It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. *United States* v. *Graham*, 110 *U. S.* 219; *Wisconsin C. R'd Co.* v. *United States*, 164 *U. S.* 190. But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *Edwards* v. *Darby*, 12 *Wheat.* 206, 210; *United States* v. *Philbrick*, 120 *U. S.* 52, 59; *United States* v. *Johnston*, 124 *U. S.* 236, 253; *United States* v. *Alabama G. S. R'd Co.*, 142 *U. S.* 615, 621. Congress can enact such legislation as may be neces-

sary to change the existing practice, if it deems that course conducive to the public interests."

In our judgment, the appellants properly construe the statute. We think it obviously means just what the Department held it to mean for more than sixteen years. But the very utmost that the Government can claim is that the statute in question is doubtful in its meaning and scope. The rule in such a case is not to disturb the long-continued practice of the Department in its execution of a statute, leaving to Congress to change it, when the public interests require that to be done. But the Department, after being informed repeatedly by Congress that the change asked by Postmasters General would not be made, concluded to effect the change by a mere order that would make the statute mean what the practice of sixteen years, and the repeated action of Congress had practically said it did not mean and was never intended to mean. This is a mode of amending and making laws which ought not to be encouraged or approved.

It is suggested that the ruling of the Department was changed because of the increased expense attending the carrying, as second class mailable matter, of such publications as those of the appellants. But how could the fact of such expense justify a change in the settled construction of a statute? That was a matter to which the attention of Congress was specially and frequently called, and yet it refused to modify the language of the statute. It was not the function of the Postmaster General to sit in judgment on the policy of legislation and to determine the extent to which Congress should authorize the expenditure of public moneys. The question of expense was entirely for the legislative branch of the government.

Something has also been said as to the discretion committed to the Post Office Department in determining what is and what is not second class mailable matter. But what about the discretion with which previous Postmasters General had been invested, when for many years they uniformily held that such publications as the plaintiffs' were second class mailable matter? Is the discretion of one Postmaster General to be deemed of more importance than the discretion of five of his predecessors in office?

In our opinion the law is for the appellants, and it should have been so adjudged.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 373.—October Term, 1903.

Bates & Guild Co., Appellants, vs. Henry C. Payne, Postmaster General. } On appeal from the Court of Appeals of the District of Columbia.

[April 11, 1904.]

This was a bill to compel the recognition by the Postmaster General of the right of the plaintiff corporation to have a periodical publication, known as "Masters in Music," received and transmitted through the mails as matter of the second class, and to enjoin defendant from enforcing an order, theretofore made by him, denying it entry as such. This case took the same course as the preceding ones. (31 Wash. L. Rep. 395.)

Mr. Justice Brown delivered the opinion of the Court.

The first number of Masters in Music was issued in January, 1903, and an application was immediately made to the Postmaster General for its admission to the mails as second class mail matter. The application was denied, and plaintiff immediately, and before the issue of another number, filed this bill. The publication purports to be a "monthly magazine," salable at twenty cents per number, and to subscribers at two dollars a year. The first number is devoted to the works of Mozart and contains a portrait, a biography of four pages, an essay of ten pages upon his art and thirty-two pages of his music. The preliminary page contained a notice to the effect that "Masters in Music will be unlike any other musical magazine. Each monthly issue, complete in itself, will be devoted to one of the world's great musicians, giving thirty-two pages of engraved piano music, which will comprise those compositions or movements that represent the composer at his best, with editorial notes suggesting the proper interpretation; a beautiful frontispiece portrait, a life, and estimates of his genius and place in art, chosen from the writings of the most eminent musical critics. The text will thus constitute an interesting and authoritative monthly lesson in musical history; its selections of music will form a library of the world's musical masterpieces, and all at slight cost. . . . The announcement of the contents of the February issue, which will treat of Chopin, will be found on another page."

The Postmaster General placed his refusal to allow this magazine to be transmitted as second class mail matter upon the ground that each number

was complete in itself; had no connection with other numbers save in the circumstance that they all treated of masters in music, and that these issues were in fact sheet music disguised as a periodical, and should be classified as third class mail matter.

Conceding the principle established in the two cases just decided to be that the fact that books published at stated intervals and in consecutive numbers do not thereby become periodicals, even though in other respects they conform to the requirements of section 14, cases may still arise where the classification of a certain publication may be one of doubt. Such is this case. But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance. In the case of *Magnetic Healing Co.* v. *McAnnulty*, (187 U. S. 94, 104,) the Post Office authorities were held to have acted beyond their authority in rejecting all correspondence with the plaintiff upon the subject of the treatment of diseases by mental action; but while it was said in that case that the question involved was a legal one, it was intimated that something must be left to the discretion of the Postmaster General.

It has long been the settled practice of this court in land cases to treat the findings of the Land Department upon questions of fact as conclusive, although such proceedings involve, to a certain extent, the exercise of judicial power. As was said in *Burfenning* v. *Chicago, St. Paul &c. R. R.*, (163 U. S. 321, 323): "Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined." (Citing cases.) See also *Johnson* v. *Drew*, (171 U. S. 93;) *Gardner* v. *Bonestell*, (180 U. S. 362.)

But there is another class of cases in which the rule is somewhat differently, and perhaps more broadly, stated, and that is, that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve

questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. In the early case of *Decatur* v. *Paulding*, (14 Pet. 497,) it was said that the official duties of the head of an executive department, whether imposed by act of Congress or resolution, are not mere ministerial duties; and, as was said by this court in the recent case of *Riverside Oil Co.* v. *Hitchcock*, (190 U. S. 324): "Whether he decided right or wrong was not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever, under these circumstances, to review his determination by mandamus or injunction."

In *Marquez* v. *Frisbie*, (101 U. S. 473,) which was a bill in equity to review the decision of the Land Department in a pre-emption case, Mr. Justice Miller remarked (p. 476): "This means, and it is a sound principal, that where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive." In *Gaines* v. *Thompson*, (7 Wall. 347,) it was held that the court would no more interfere by injunction than by mandamus to control the action of the head of a department; and in *United States ex rel. Dunlap* v. *Black*, (128 U. S. 40,) it was said that the courts will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, no appellate power being given them for that purpose. See also *Redfield* v. *Windom*, (137 U. S. 636.)

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Upon this principle, and because we thought the question involved one of law rather than of fact, and one of great general importance, we have reviewed the action of the Postmaster General in holding serial novels to be books rather than periodicals; but it is not intended to intimate that in every case hereafter arising the question whether a certain publication shall be considered a book or a periodical shall be reviewed by this court. In such case the decision of the Post Office Department, rendered in the exercise of a reasonable discretion, will be treated as conclusive.

In the case of Masters in Music the question really is whether a pamphlet, complete in itself, treating of the works of a single master, with a greater part of the pamphlet devoted to specimens of his genius, shall be

controlled by the cover, which declared that these numbers will be issued monthly, at a certain subscription price per year. Although a comparison of the exhibit with the statute may raise only a question of law, the action of the Postmaster General may have been, to a certain extent, guided by extraneous information obtained by him, so that the question involved would not be found merely a question of law, but a mixed question of law and fact. While, as already observed, the question is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final. The decree of the Court of Appeals is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 373.—October Term, 1903.

Bates & Guild Co., Appellants, vs. Henry C. Payne, Postmaster General. } On appeal from the Court of Appeals of the District of Columbia.

[April 11th 1904.]

Mr. Justice Harlan (with whom concurred the Chief Justice) dissenting.

The Chief Justice and myself are of opinion that the publication here in question is second class mailable matter, and cannot concur in the opinion and judgment of the court. Our reasons for dissenting are stated in the opinion filed by us in *Houghton* v. *Payne*, just decided.

But there are some things in the opinion of the court in this case to which we shall advert. It is said that the case is one of doubt. Now, it was admitted at the bar by the Government that the publication known as "Masters in Music" would be carried in the mails as second class matter if the question be decided in accordance with the construction placed upon the statute by the Department for more than sixteen years continuously prior to the present ruling of the Department. We had supposed it to be firmly settled that the established practice of an Executive Department charged with the execution of a statute will be respected and followed—especially if it has been long continued—unless such practice rests upon a construction of the statute which is clearly and obviously wrong. In *United States* v. *Philbrick*, 120 *U. S.* 59, which involved the construction placed by an Executive Department upon an act of Congress, this court said: "Since it is not clear that that construction was erroneous, it ought not now to be overturned." So in *United States* v. *Healey*, 160 *U. S.* 145, the court said that it would accept the uniform interpretation by the Interior Department of an act relating to the public lands, "as the true one, if upon examining the statute we found its meaning to be at all doubtful or obscure." The authorities to that effect are numerous. *Edwards* v. *Darby*, 12 *Wheat.* 206; *Hahn* v. *United States*, 107 *U. S.* 402; *United States* v. *Graham*, 110 *U. S.* 219; *Brown* v. *United States*, 113 *U. S.* 371; *United States* v. *Philbrick*, 120 *U. S.* 59; *United States* v. *Johnson*, 124 *U. S.* 236; *United States* v. *Hill*, 120 *U. S.* 183; *Finnell* v. *United States*, 185 *U. S.* 236; *United States* v. *Ala. G. S. R. R. Co.*, 142 *U. S.* 244; *Hewitt* v. *Schultz*, 180 *U. S.* 139,

157. Some of them are cited in the opinion of the court in *Houghton* v. *Payne*. The rule of construction which this court has recognized for more than three-quarters of a century is now overthrown. For, it is adjudged that the practice of the Post Office Department, covering a period of sixteen years and more, need not be regarded in this case, although the construction of the statute in question is admitted to be doubtful. We cannot give our assent to this view.

True copy.

Test:

Clerk Supreme Court, U. S.